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Nos. 14-571 & 14-574

In The
Supreme Court of the United States

APRIL DEBOER, et al.,

Petitioners,

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, et al.,

Respondents.

GREGORY BOURKE, et al.,

Petitioners,

v.

STEVE BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In this brief *amicus curiae*, American Bar Association responds to only the first Question Presented:

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of petitioners with respect to the first Question Presented. ABA members who represent same-sex couples know firsthand the discriminatory effects of state laws barring such couples from marrying. Although lawyers can sometimes counsel their clients on ways to avoid or limit the effects of these laws, they know from experience that no legal "work-around" can cure the discriminatory effects that necessarily result when a state denies formal recognition of a same-sex couple's commitment through marriage. Based upon this experience, and as a longtime advocate of equal treatment for all before the law, the ABA urges this Court to hold that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex.

The ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. A letter on behalf of all petitioners consenting to the filing of this brief accompanies this brief; all respondents have also consented to the filing of *amicus curiae* briefs in support of either party or neither party. *See* Dockets in *DeBoer v. Snyder*, No. 14-571 (U.S. Jan. 26, 2015); *Bourke v. Beshear*, No. 14-574 (U.S. Jan. 26, 2015).

States. Its membership comprises nearly 400,000 attorneys in all fifty states, the District of Columbia, and the U.S. territories, and includes attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges,[2] legislators, law professors, law students, and non-lawyer associates in related fields.

Since its founding in 1878, the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution, including the elimination of discrimination. The ABA's mission is to serve the legal profession and the public "by defending liberty and delivering justice." Over the past forty years, the ABA has repeatedly advocated against discrimination based on sexual orientation. In 1973, the ABA adopted a policy urging the repeal of laws that criminalized private sexual relations between consenting adults.[3]

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] Only recommendations that are presented to and adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See House of Delegates – General Information*, A.B.A., http://www.abanet.org/leadership/delegates.html (last visited Mar. 2, 2015). The ABA policies dating from 1988 onward that are discussed in this brief are

(Continued on following page)

Since that time, the ABA has adopted numerous other policies, including, in 1987, a policy that condemned bias-motivated crimes and urged prosecution of perpetrators thereof; in 1989, that advocated against discrimination based on sexual orientation in employment, housing, and public accommodations; in 1991, that supported federal legislation requiring a study of bias in the judicial system; and in 1992, that supported university policies opposing discrimination based on sexual orientation.

In addition, the ABA has adopted policies advocating equal rights in family law issues, including a 1995 policy that addressed child-custody matters and visitation rights, and a 1999 policy that called for adoption to be based on the best interest of the child, and not on the sexual orientation of a prospective parent. Similarly, the ABA adopted a 2002 policy urging that surviving partners of victims of terrorism be eligible for governmental compensation available to eligible spouses.

The ABA also has worked to eliminate discrimination against gay men and lesbians who are, or wish to become, lawyers. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association (now the National LGBT Bar Association) an affiliated organization with a vote in the ABA House of Delegates. In 1994, the ABA

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available online at http://www.americanbar.org/directories/policy.html. Policies dated prior to 1988 are available from the ABA.

incorporated into its Standards for the Approval of Law Schools a requirement that accredited law schools not discriminate on the basis of sexual orientation. In 1996, the ABA adopted a policy urging state and local bar associations to study bias based on sexual orientation within the legal profession and the criminal justice system. And in 2002, the ABA amended its constitution to prohibit state and local bar associations that discriminate on the basis of sexual orientation from having representation in the House of Delegates.

In furtherance of these policies, the ABA participated as *amicus curiae* before this Court by filing briefs in *Romer v. Evans*, 517 U.S. 620 (1996), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Finally, and of special relevance to the question now before the Court, the ABA in 2010 adopted a policy urging states, territories, and tribal governments to eliminate all legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry. The resolution was based on the ABA's commitment to eliminating discrimination against same-sex couples and their families and its position that exclusion of same-sex couples from marriage offends our constitutional commitment to liberty and equality.

ABA members who represent same-sex couples know from experience the numerous obstacles same-sex couples face in ordering their affairs and providing security for themselves and their children in the most basic aspects of life: parenting, dealing with sickness and old age, paying taxes, passing on a legacy to their heirs, and the myriad other legal and practical issues – several of which are discussed in this brief, and some of which are set forth in Table 1: Select Default Rights Conferred via Marriage and State Law References to Spousal Status, which appears in the Appendix to this brief (hereinafter, "Table 1"). The ABA accordingly has a strong interest in seeing that the question presented here is resolved in a manner that recognizes the dignity and equality of same-sex couples and that is consistent with the fundamental principles that undergird the rule of law: fairness, equality and liberty. For these reasons, the ABA urges this Court to reverse the judgments below.

SUMMARY OF ARGUMENT

The first question before the Court raises issues that affect the daily lives of petitioners, their families, and other same-sex couples and their families across the country. Its answer will have an impact just as wide, and in a very practical way, on the practice of many attorneys.

ABA members have long struggled to help clients avoid the discriminatory effects of state laws that single out same-sex couples for exclusion from marriage and its civil incidents. These include the inability to adopt children jointly, resulting in a class of children denied the legal protections afforded to the children of married couples; the lack of an automatic right to determine how to dispose of a deceased partner's remains or to receive property under the law of intestacy; limits on a same-sex partner's ability to direct medical decisions in the event of a partner's incapacity; the denial of tax benefits such as the ability to file joint income tax returns or to transfer real property without transfer taxes; and lack of the protection against legal compulsion to reveal a spouse's confidences. Table 1 in the Appendix highlights some of the ways in which different-sex married couples are granted automatic spousal rights and, conversely, the broad discrimination that occurs when those rights are denied to same-sex couples through exclusion from marriage.

ABA lawyers often advise their clients who are in same-sex relationships on ways to mitigate and – to the extent feasible – work around some of these consequences. As described in this brief, however, the array of legal work-arounds is imperfect, costly, and complex – and as a result the rights of marriage remain unavailable to many. Ultimately, these mitigating measures cannot eliminate the concrete legal and economic harms that flow from the laws under review, which denigrate the dignity of same-sex

couples and their families and impose on them an inferior status that violates the Constitution's guarantee of equal protection.

ARGUMENT

LAWS THAT DENY SAME-SEX COUPLES THE RIGHTS AND OBLIGATIONS OF MARRIAGE VIOLATE THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION.

This case is about the "freedom to marry," which this Court has consistently described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Lawrence*, 539 U.S. at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage "); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (choices about marriage are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect").[4]

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[4] *See also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

As this Court has recognized, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Michigan and Kentucky laws under review, and all similar laws that deny same-sex couples the ability to enjoy the rights, benefits, protections and obligations of marriage, violate the "equal protection of the laws" guaranteed by the Fourteenth Amendment.

A. ABA Members' Experience Demonstrates That Legal Substitutes for Marriage Rights and Obligations Are Costly, Complex, and Unequal.

The Michigan and Kentucky laws under review are just two of the thirteen state constitutional and statutory schemes currently in force that deny marriage equality to same-sex couples ("marriage bans"). Fourteen more state marriage bans have been enjoined over the objections of state officials.[5]

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[5] In addition to Michigan and Kentucky, as of this filing eleven other states (Arkansas, Georgia, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas) deny marriage to same-sex couples. An additional nine states (Alabama, Alaska, Arizona, Florida, Idaho, Kansas, Montana, North Carolina, South Carolina) are actively defending their marriage bans in federal district court or on appeal, but enforcement of the laws has been enjoined. Another five states (Indiana, Oklahoma, Utah, Virginia, Wisconsin) unsuccessfully sought to reverse a final federal judgment finding their marriage bans unconstitutional and were denied review by this Court. In a recent decision, the District Court for the District of Nebraska preliminarily enjoined that state's marriage ban, effective March 9, 2015.

ABA lawyers have seen for decades the costs, in time, money, and suffering that such marriage bans inflict on same-sex couples, their children, and larger family and social circles. ABA members have counseled many thousands of clients in ways legally to re-create the rights and obligations that accrue automatically from marriage. But these efforts are at best incomplete solutions and only highlight the pervasive difficulties imposed by exclusionary laws like those in Michigan and Kentucky.

This brief addresses some of the daily harms experienced by same-sex couples and highlights the legal difficulty, and sometimes impossibility, of working around those harms. In Table 1 of the Appendix, three of the issues presented by marriage bans are highlighted for the twenty-seven states in which marriage bans (A) are being contested in litigation or (B) had been contested through final judgment in the relevant federal court of appeals and where certiorari was denied. These issues are: (1) rights of inheritance; (2) rights to direct the burial of a partner's remains; and (3) rights to make medical decisions. The table also identifies the number of statutory and constitutional provisions in each state that reference terms such as "spouse," "husband," or "wife," demonstrating the importance of marriage and the status of being married in each of these states. For example, the Michigan statutory code and constitution contain 778 provisions that reference marriage or spouse or use similar marriage-related terms. Of those provisions, 453 contain a form of the word "spouse";

138 contain the word "husband"; and 122 contain the word "wife." In Kentucky, the total number is 508.[6] As shown in Table 1, the total across all twenty-seven states is more than 17,000.

Legal work-arounds and substitutes for the rights and benefits that are automatically granted through marriage, to the extent they are available, are potentially costly and require a same-sex couple proactively to recognize the issue and consult a lawyer. Some of these harms derive from federal law's reliance on state-law marital status,[7] yet many are

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[6] These numbers, and those for the other states studied, were obtained by performing an electronic database (Westlaw) search of the respective state's statutes and constitutions for any of the following keywords: marriage, married, marry, marrying, marries, husband, wife, spouse, spouses, spousal, widow, widower, widowed. Regulations and court rules were excluded. This methodology is necessarily imperfect and may capture provisions that are definitional, that mention the above terms in passing, or that do not actually affect an individual's rights or obligations. *Cf.* Letter from Barry R. Bedrick, U.S. Gen. Accounting Office, to Rep. Henry J. Hyde (Jan. 31, 1997) (explaining statute-counting methodology in U.S. Gen. Accounting Office, GAO/OGC-97-16, Defense of Marriage Act (1997)); Letter from Dayna K. Shah, U.S. Gen. Accounting Office, to Sen. Bill Frist (Jan. 23, 2004) (updating prior report).

[7] Among federal law benefits affected by state law marital status are the Social Security spousal and survivorship benefits, *see* 42 U.S.C. § 402 (2012) (offering spousal benefits during a spouse's life, as well as survivor benefits, and lump-sum death benefits), and the right to leave under the Family Medical Leave Act ("FMLA"), *see* 5 U.S.C. § 6382(a)(1)(C), (a)(3) (2012); 29 U.S.C. § 2612(a)(1)(C), (a)(3) (2012) (granting eligible employees leave to care for a spouse who has a serious healthcare condition, or

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unique to state law or rest on state law's incorporation of or coordination (particularly in the tax arena) with federal law.

1. Parental Rights

Attorneys who advise same-sex couples with children face profound obstacles in assisting those couples in establishing legal bonds with their children when those couples live in states that deny them the protections of marriage. Indeed, the most basic

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injury from military service). The Social Security Act limits spousal benefits to persons who are found to be "validly married" by a court of the state where they were "domiciled" at the time of application or death. 42 U.S.C. § 416(h)(1). Similarly, FMLA benefits for same-sex spouses are limited to states that recognize their marriages. *See* U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet No. 28F (Aug. 2013). Same-sex couples who cannot marry in their state are excluded from these benefits.

The executive branch has recently sought to extend benefits to same-sex married couples. *See* Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2016, at 38 (2015), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf (President's proposed budget for 2016 would extend Social Security spousal benefits to same-sex married couples whose state does not recognize their marriage); Definition of Spouse Under the Family and Medical Leave Act, 80 Fed. Reg. 9989, 9989-10,001 (Feb. 25, 2015) (to be codified at 29 C.F.R. pt. 825 and effective starting March 27, 2015) (revising for FMLA purposes the definition of spouse to recognize marriages based on "place of celebration" instead of "state of residence"). Yet such measures would not extend benefits to same-sex couples barred from marrying in their own states and who cannot leave their states to be married due to financial burdens or illness.

aspects of family life, such as being legally recognized as the parent of one's child, are beyond the reach of many same-sex couples in such states, even those who can afford legal counsel. For example, in many states, the presumption that a child born to a married couple is the child of both spouses is considered to be "one of the strongest presumptions in the law." *In re K.H.*, 677 N.W.2d 800, 806 (Mich. 2004) (quoting *People v. Case*, 137 N.W. 55, 56 (Mich. 1912)); *see also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (allowing presumption of legitimacy even where husband was not the biological father); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. Rev. 227, 232 (2006) (discussing history of the presumption). By contrast, lawyers advising same-sex couples who cannot marry must provide counsel that takes into account the fact that the couple cannot invoke the benefit of this marital presumption of parenthood.

The inability to rely on the marital presumption can have acute legal consequences for parents and their children. If one partner is a biological parent of a child, the other partner may be treated as a legal stranger with no parental rights if the relationship ends or the biological-parent partner dies. *See, e.g.*, *Harmon v. Davis*, No. 297968 (Mich. Ct. App. July 8, 2010), *available at* http://publicdocs.courts.mi.gov:81/COA/PUBLIC/ORDERS/2010/297968(22)_order.PDF (holding that an adult who is neither a biological parent nor related through marriage or adoption is

not a parent for purposes of Michigan Child Custody Act), *leave to appeal denied*, 800 N.W.2d 63 (Mich. 2011); *see also* 800 N.W.2d at 64 (Kelly, J., dissenting) (observing how lower appellate court's decision effectively barred plaintiff from having child visitation rights after end of a nineteen-year same-sex relationship).

Such inequities cannot be fully remedied through the assistance of legal counsel, particularly where, as in Michigan, joint or second-parent adoption by same-sex couples is not available or fully recognized by the state. *See, e.g.*, *DeBoer v. Snyder*, 772 F.3d 388, 424 (6th Cir. 2014) (Daughtrey, J., dissenting); *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (upholding state practice excluding same-sex couple from listing both parents' names on adopted child's birth certificate because they are unmarried under the law of the child's birth state). In such states, non-biological parents' connection to their children remains at the discretion of their former partners or a family court judge. *See, e.g.*, *Truman v. Lillard*, 404 S.W.3d 863, 869-70 (Ky. Ct. App. 2013) (affirming decision that former same-sex partner lacked legal basis for custody or visitation as she did not qualify as a "*de facto* custodian"); Ross T. Ewing, *Gay and Lesbian Parents in Kentucky*, Ky. Bench & B. Mag., Jan. 2014, at 8, 9, *available at* http://www.kybar.org/documents/benchbar_searchable/benchbar_0114.pdf (Kentucky's "marriage prohibitions[,] . lack of second-parent adoption, and the out-moded provisions of [the] 1964 Uniform Paternity Act ensure that one partner will

legally be a non-parent to any children raised by [a same-sex couple]") (footnotes omitted).

Likewise, the unavailability of marriage to same-sex couples punishes their children by depriving them not only of access to a parent but also the benefit of child-support and alimony payments. Whereas a married different-sex spouse may not simply walk away from his or her financial obligations to a family, a non-biological parent from a same-sex relationship who has been denied marriage and adoption rights has no such legal obligation. *See*, *e.g.*, Ewing, *supra*, at 10 (in Kentucky, "[n]o statutory or common-law authority requires a non-parent to financially support the legal children of another, absent perhaps an enforceable contract to do so"). Such policies cannot further the best interests of the children involved.

2. Death and Inheritance

In most matters of death and inheritance, the law typically grants surviving spouses automatic rights. For instance, all states grant surviving spouses rights in inheritance, *see infra* app. Table 1, following the policy that the deceased would have wanted rights and property to pass to the surviving spouse. Same-sex couples who cannot marry are denied these automatic rights and must seek legal counsel to craft substitute arrangements.

Another of these rights is the right to determine the disposition of the physical remains of a deceased partner. Under Michigan law, for example, the right

to make decisions about funeral arrangements and the disposition of a decedent's body presumptively belongs to the decedent's spouse. If there is no surviving spouse, the right belongs to persons "related to the decedent in the closest degree of consanguinity." Mich. Comp. Laws § 700.3206 (2014); *cf.* Ky. Rev. Stat. Ann. § 367.97501 (West 2014) (right to make decisions regarding remains goes to the surviving spouse, then adult children, then parents); *see also infra* app. Table 1 (showing automatic spousal right in all twenty-seven states).

The default rules in these statutory schemes recognize a deep emotional investment in the disposition of a spouse's remains. This Court has recognized marriage to have "spiritual significance" to many people, *Turner v. Safley*, 482 U.S. 78, 96 (1987), and spiritual choices affect not only ceremonial aspects of the marriage but the fundamental framework in which a married couple chooses to live their lives, raise children, and be laid to rest. The same considerations hold true for committed same-sex partners who cannot marry. Petitioner Love, for example, holds a commonly shared fear that in the event of his or his partner's death, the surviving partner could be excluded entirely from planning or attending a funeral. Affidavit of Timothy Love and Lawrence Ysunza in Support of Plaintiffs' Motion for Summary Judgment para. 13, *Love v. Beshear*, No. 3:13-CV-750-JGH (W.D. Ky. Apr. 18, 2014).

Same-sex couples are also denied automatic inheritance rights granted to surviving spouses when

their spouse dies intestate. Michigan law, for example, provides that a spouse inherits the entire estate if no descendant or parent survives; where there are additional surviving relations, the spouse inherits the first $100,000 of an intestate estate plus one-half of the remaining balance. Mich. Comp. Laws § 700.2102; *cf.* Ky. Rev. Stat. Ann. § 391.030 (exempting first $15,000 of estate for surviving spouse whether or not will in place). Under intestacy regimes such as Michigan's, a committed same-sex partner and sometimes the couple's children (absent a biological relationship or a valid adoption) will receive nothing.

Because intestacy rules apply as a default if a decedent lacks a will, it is possible through careful estate planning to navigate some of the legal risks surrounding the death of one member of an unmarried same-sex couple.[8] However, even if an estate plan is put in place successfully, the process is likely to be a greater burden on the finances and time of same-sex couples than for different-sex spouses. Lawyers must be careful to account for the fact that laws, rules, and forms may assume the ability to marry, and develop a nuanced understanding of the

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[8] For property intended to be jointly owned, unmarried same-sex couples may be able to establish joint trusts and include pour-over provisions to fund the trust in a will. However, these must account for scenarios in which the relationship ends, may incur gift taxes, and may subject the parties to one another's creditors' claims and malpractice claims. *See* Joan Burda, ABA, *Gay, Lesbian and Transgender Clients: A Lawyer's Guide* 226-27 (2008).

differences in state regimes and complex family arrangements that same-sex couples must negotiate. In addition, wills of individuals in same-sex relationships are particularly vulnerable to challenge, both because of the lack of certainty concerning the legal status of the couple's relationship and because of the risk of hostility toward same-sex partners from family members and the judiciary. *See*, *e.g.*, Camille M. Quinn & Shawna S. Baker, *Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma*, 40 Tulsa L. Rev. 479, 502-04 (2004) (collecting examples of will challenges over property shared by same-sex couples).

Same-sex partners may also be precluded from filing wrongful death actions. Such suits account for probable loss of financial support caused by a wrongful death, and may compensate for the loss of advice, assistance, and companionship. Restatement (Second) of Torts § 925 & cmts. (a)-(b) (1979). The right to file and benefit from such a suit is usually granted automatically to spouses. *See*, *e.g.*, Mich. Comp. Laws § 600.2922(3)(a) (surviving spouse entitled to damages under a wrongful death action); Ky. Rev. Stat. Ann. § 411.130 (surviving spouse entitled to at least one-half of damages). The same option, however, is generally not provided to unmarried, same-sex partners, who face the same concerns following the wrongful death of a partner. Some states provide limited allowances for nonrelatives. *See* Mich. Comp. Laws § 600.2922 (allowing beneficiaries of an enforceable will to benefit from a wrongful death suit). Others do

not. *Cf.* Ky. Rev. Stat. Ann. § 411.130 (allowing only "kindred" to benefit from a suit).

Same-sex partners are also frequently ineligible to receive survivorship benefits for spouses of public safety officers. Kentucky provides a lump-sum payment of $80,000 to a spouse of any police officer, corrections officer or member of the National Guard who dies as a direct result of an act in the line of duty. Ky. Rev. Stat. Ann. § 61.315. Kentucky law also provides free tuition at a state-supported school for children and spouses of firefighters or police officers who die from duty-related injuries. Ky. Rev. Stat. Ann. § 164.2841; *cf.* Mich. Comp. Laws §§ 390.1241-.1243 (providing state college grants under the same circumstances). These benefits provide comfort for individuals with dangerous jobs serving their communities, by extending financial security to their families in case of their death. However, the surviving same-sex partner of a public safety officer may be excluded from these employment-based death benefits. *See, e.g.*, *Glossip v. Mo. Dep't of Transp. & Highway Patrol Emps. Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013) (en banc) (upholding denial of survivor benefits to same-sex partner of highway patrol employee killed in the line of duty).

3. Health and Well-being

By excluding same-sex couples from marriage, Michigan and Kentucky also deny them the legal means readily available to different-sex couples to

ensure their families' health and well-being. For example, same-sex couples face obstacles at times when critical healthcare decisions are needed – when one member of a couple unexpectedly falls ill or is injured in an accident and is unable to communicate. All states provide for an orderly determination of persons authorized to make medical decisions for such an individual in the event that they have not completed legal documentation designating someone to do so. The default order generally prefers a spouse over other family members. *See* Samuel H. Grier & Tad D. Ransopher, *Tax Compliance & Estate Planning for Same-Sex Couples*, 5 Est. Plan. & Community Prop. L.J. 323, 365-66 (2013); *see also*, *e.g.*, Ky. Rev. Stat. Ann. § 311.631 (absent judicially appointed guardian or attorney-in-fact, spouse has priority to make healthcare decisions on behalf of patient, followed by other relatives); *infra* app. Table 1 (twenty-five of twenty-seven states with challenged marriage bans grant spouse some form of medical decision-making power automatically). Because they are not legal spouses, same-sex partners may be excluded from medical decision-making for a partner.

While lawyers can assist individuals in drafting powers-of-attorney and other legal designations to work around the default order, clients who are members of same-sex couples often have trouble exercising the rights granted to them by such instruments. Same-sex partners are sometimes prevented by hospital staff from even seeing their partners, despite having the legal designations granting them the right

to make healthcare decisions. For example, when Bill Flanigan's partner Robert Daniel fell ill and was admitted to a trauma center in Maryland – prior to Maryland's adoption of marriage equality in 2013 – Flanigan had power of attorney for healthcare decisions but was not permitted to consult with doctors or to see Daniel until biological family members arrived. *See* Complaint, *Flanigan v. Univ. of Md. Med. Sys. Corp.*, No. 24-c-02-001289 (Md. Cir. Ct. Balt. Feb. 27, 2002). By then Daniel was on life support – against his wishes previously articulated to Flanigan – and unconscious; he died three days later.[9]

Same-sex couples also face obstacles in obtaining the health insurance coverage that different-sex married couples often receive through an employer's healthcare plan. An employee's spouse and children may often be enrolled in the employer's plan and are thus given the peace of mind that comes with such coverage. Unmarried same-sex partners, on the other hand, often do not qualify as spouses for such coverage, preventing them from accessing benefits available to their different-sex married co-workers. Thus, same-sex couples are forced to turn to other, usually

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[9] The case of Janice Langbehn and her partner, Lisa Pond, brought this issue to national attention in 2007. Pond collapsed while on a trip to Florida and was sent to the hospital, where Langbehn, despite having faxed a power-of-attorney to the hospital, was not permitted to be by Pond's side until after she had died. *See* Tara Parker-Pope, *Kept from a Dying Partner's Bedside*, N.Y. Times, May 19, 2009, at D5, *available at* http://www.nytimes.com/2009/05/19/ health/19well.html.

more costly, health insurance alternatives. *See* Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, Oct. 3, 2009, at A1, *available at* http://www.nytimes.com/2009/10/03/your-money/03 money.html?pagewanted=all&_r=0. Or they have to go without health insurance at all. Some private employers, recognizing the inequity, extend benefits to same-sex couples. While providing some relief, these extensions are not treated like the coverage available to different-sex spouses for federal tax purposes. This is because the federal tax code exempts employer contributions to a spouse's health plan. *See* 26 U.S.C. § 106(a) (2012); Treas. Reg. § 1.106-1. But for same-sex couples prohibited from marrying, the value of the insurance coverage is treated as federally taxable income. *See* Grier & Ransopher, *Tax Compliance*, *supra*, at 333. In states that follow this result, lawyers have no means of avoiding this unequal consequence. *See* James Angelini, *The Federal and State Taxation of Domestic Partner Benefits*, Tax Analysts (Nov. 8, 2011), http://www.taxanalysts.com/www/features.nsf/Articles/03CEC7C26C62E94A852579420059DC81?OpenDocument.

4. Economic Protections

Providing tax advice for same-sex couples is particularly complex, as the simple example of buying and selling a home illustrates. Among other issues arising in this context, same-sex couples may be unable to transfer property without application of real estate transfer taxes. For example, Michigan law

entirely exempts transfers of real estate between spouses. Mich. Comp. Laws § 207.526(i). A home or property can be jointly owned, and that arrangement can be ended, without a tax penalty. Similarly, transfers of title between spouses, and between former spouses as part of a divorce, are exempted from real estate transfer taxes in Kentucky. Ky. Rev. Stat. Ann. § 142.050(7)(e).

Unmarried same-sex couples, however, are deprived of these tax exemptions. Jointly owned property or property held with survivorship rights, unlike property transferred under the marital deduction, will incur a standard estate tax upon the death of each partner. For example, Plaintiff Love and his partner face the prospect of inheritance taxes upon either of their deaths. Affidavit of Timothy Love and Lawrence Ysunza in Support of Plaintiffs' Motion for Summary Judgment para. 11, *Love v. Beshear*, No. 3:13-CV-750-JGH (W.D. Ky. Apr. 18, 2014). Without careful estate planning by a lawyer – often requiring collaboration with a tax attorney – an estate tax on jointly held property may render a surviving partner solely responsible for the tax, often resulting in financial difficulties and sometimes the forced sale of a home. *See*, *e.g.*, Burda, *supra*, at 242 (describing difficulties caused by inability to take advantage of the federal unified estate and gift tax credit).

The legal work-arounds available for this and other estate planning challenges – just to achieve the protections granted married different-sex couples by default – are complex. Some same-sex couples resort

to establishing tenancies-in-common or "Transfer on Death" deeds for their home. *See, e.g.*, Affidavit of Timothy Love and Lawrence Ysunza in Support of Plaintiffs' Motion for Summary Judgment paras. 9-10, *Love v. Beshear*, No. 3:13-CV-750-JGH (W.D. Ky. Apr. 18, 2014). Other alternatives require same-sex couples to apply the law in ways it was never intended to function. For example, some same-sex couples have turned to adult adoption, in which one member of the couple adopts the other, in order to secure inheritance rights for the other. *See* Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 Fordham Urb. L.J. 927, 948-51 (1994). The awkwardness of this solution demonstrates the harmfulness of the current *de jure* discrimination against same-sex couples inflicted by the marriage bans. Moreover, these options often require the repeated (and costly) attention of attorneys, who must have a specialized understanding of how the law affects same-sex couples in ways that the couples themselves may not fully appreciate, which many same-sex couples cannot afford. Oftentimes same-sex couples do not understand the obscure negative tax consequences of the legal treatment of their relationship until too late, when lawyers can offer no assistance.

Income taxes are similarly difficult for same-sex couples. Unmarried same-sex couples may not file joint state tax returns in Kentucky or Michigan and are therefore excluded from beneficial tax treatment granted to similarly situated married couples. These benefits often reduce tax burdens on married couples,

who share incomes and certain expenses relating to child care and a joint household. Filing jointly as a married couple in Kentucky, for example, allows a couple to use their joint income as the basis for calculating the "Family Size Tax Credit," which offers a 100% tax credit if their combined modified gross income is at or below federal poverty level for their family size. In 2014, for instance, an individual filer could receive the credit only if his or her income was under $11,670, regardless of whether he or she was supporting a partner. A married couple in the same situation would be eligible if their combined income was $15,730. Ky. Rev. Stat. Ann. § 141.066(4); Ky. Dep't of Revenue, *2014 Individual Income Tax Updates & Tips*, Ky. Tax Alert, Jan. 2015, at 1, 1. This credit provides married couples with greater flexibility to juggle responsibilities, and is largely responsible for the low tax burden on the lowest-income households in Kentucky. Blue Ribbon Comm'n on Tax Reform, *Report by the Blue Ribbon Commission on Tax Reform to Governor Steve Beshear* app. L, at 76 (2012).

In addition, under state and federal law, families are ineligible for certain benefits if the parents cannot marry or establish a legal relationship to one another's children. Michigan's Earned Income Tax Credit, for example, is calculated based on a family's eligibility under the federal Earned Income Tax Credit ("EITC"). Mich. Comp. Laws § 206.272 (amended pending conditions by 2014 Mich. Pub. Acts 469). The amount of the EITC increases for families

with lower incomes and a higher number of children. However, the calculation accounts only for a "qualifying child," a definition that does not encompass children of an unmarried partner who do not share a legal relationship with the filer. *See* 26 U.S.C. §§ 32, 152(c) (2012 & Supp. I 2013). The effect of these rules, together with the laws under review, is to reduce the eligibility of same-sex partners and their families for tax credits that are routinely relied upon by different-sex married couples and their children.

5. Privilege

The laws under review also interfere with the "confidence which should subsist between those who are connected by the nearest and dearest relations of life." *Stein v. Bowman*, 38 U.S. 209, 223 (1839). In all states, including in Michigan and Kentucky, rules of evidence protect spousal communications from disclosure because courts and legislators have recognized the "wise public policy . to preserve with sacredness the confidences of the marriage state." *Carter v. Hill*, 45 N.W. 988, 989 (Mich. 1890). *See, e.g.*, Mich. Comp. Laws § 600.2162(4) ("[A] married person or a person who has been married previously shall not be examined in a civil action or administrative proceeding as to any communication made between that person and his or her spouse or former spouse during the marriage."); Ky. R. Evid. 504(b) ("An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse

during their marriage."). In addition, many states prevent spouses from being forced to testify against the other. For example, under Kentucky's Rules of Evidence, a spouse "has a privilege to refuse to testify against [his or her spouse] as to events occurring after the date of their marriage." *Id.* R. 504(a); *cf.* Mich. Comp. Laws § 600.2162(7) ("[A] married person shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse without the consent of the person to be examined."). This privilege "furthers the important public interest in marital harmony." *Trammel v. United States*, 445 U.S. 40, 53 (1980).

Same-sex couples in Michigan and Kentucky are not entitled to invoke these privileges. As a result, individuals in same-sex relationships may be compelled to testify against their partners in cases implicating profound liberty interests. *Cf. Commonwealth v. Clary*, No. 11-CR-3329 (Ky. Cir. Ct. Sept. 23, 2013), *available at* http://ftpcontent.worldnow.com/wdrb/news/bobbijo.pdf (ordering same-sex partner of defendant charged with murder to testify against her partner because the couple, although having entered into a civil union in Vermont in 2004, was not married and therefore not entitled to spousal privilege). No amount of legal counseling can create a substitute for this protection.[10]

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[10] Relatedly, same-sex couples often come to a lawyer seeking advice together, but this can present ethical concerns

(Continued on following page)

Notably, if permitted to stand, the current state-by-state patchwork of laws related to marriage, with some states allowing same-sex couples to marry and other states prohibiting them from doing so, also means the judiciary will likely face vexing choice-of-law applications in cases involving couples from a state that recognizes marriages of same-sex couples and activities in a state where the marriage is not recognized but the privilege is. *See* Katherine T. Schaffzin, *Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of So Many More Than Criminal Defendants*, 63 U. Kan. L. Rev. 103, 127-28 (2014) (discussing complexities inherent in competing legal regimes where marriages of same-sex couples are recognized only in certain states).

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related to potential conflicts. *See* Burda, *supra*, at 6-7 (noting that, among other challenges, an attorney may not be able to keep one partner's confidences when adverse to the other's interest). Because the laws of Kentucky and Michigan treat same-sex couples as "legal strangers," lawyers must "take extra steps to ensure that clients understand they are entitled to separate counsel, the advantages of individual counsel, and the disadvantages of both using the same lawyer." *Id.*; *see also* Model Rules of Prof'l Conduct R. 1.7(b)(4) (2013) (allowing joint representation with informed consent); Mich. Rules of Prof'l Conduct R. 1.7(a) (same); Ky. Sup. Ct. R. 1.7(b) (same). If the lawyer concludes that joint representation is not ethically permissible or otherwise advisable, same-sex couples must bear the additional cost of engaging a second lawyer.

6. Ethical Obligations

The laws under review also have the unintended effect of withdrawing certain obligations from same-sex couples that are crucial to government integrity, as the Court recognized in *Windsor*. *See* 133 S. Ct. at 2695. State legislators in Kentucky, for example, must file a statement disclosing certain financial information for themselves and their spouses. Ky. Rev. Stat. Ann. § 6.787; *see also id.* § 11A.050 (requiring similar for certain executive officers, candidates, public servants, and their spouses). In addition, a legislator or his or her spouse can be criminally liable for soliciting or accepting "anything of value" from a lobbyist. *Id.* § 6.751; *see also id.* § 11A.045 ("No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars ($25) in a single calendar year from any person or business . . .").

Similarly, Michigan's Regulatory Boards and Commissions Ethics Act requires members of state regulatory boards to disclose any association or interest – including their own and those of a spouse – in matters that appear before their board and refrain from voting on the matter. Mich. Comp. Laws § 15.483(1)(a) ("Disclosure is also required if a spouse, child, or stepchild of a board member is a director, officer, direct or indirect shareholder, or employee of an entity under consideration before the board.").

Such strictures do not apply to same-sex couples under Kentucky or Michigan law. *See* Ky. Const. § 233A; Ky. Rev. Stat. Ann. §§ 402.005, .020(1)(d), .040(2), .045; *cf.* Mich. Const. art. I, § 25; Mich. Comp. Laws §§ 551.1-.4. In addition to undermining the dignity of same-sex couples, this undermines the good-governance purposes of these laws.[11]

B. Legal Substitutes Cannot Cure the Discriminatory Effects of the Marriage Bans.

As the discussion above illustrates, attorneys can sometimes help same-sex couples create through legal means an approximation of the particular rights and benefits that flow automatically from marriage. But even when these work-arounds are not complex or costly, and even where they can usually obtain the desired result, they are necessary only because marriage bans create obstacles that different-sex couples, through marriage, do not have to navigate. And, regardless of their effectiveness, these partial solutions cannot cure the discriminatory effects of the marriage bans on same-sex couples and their families

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[11] Federal ethics statutes, enforceable against same-sex *married* couples in light of *Windsor*, have no effect on same-sex couples who cannot marry. *See* U.S. Office of Gov't Ethics, LA-13-10, Effect of the Supreme Court's Decision in *United States v. Windsor* on the Executive Branch Ethics Program 2 (2013) (the terms "marriage," "spouse," and "relative" will not incorporate "a federal employee in a civil union, domestic partnership, or other legally recognized relationship other than a marriage").

that result from society's denial of its formal recognition of a couple's commitment.

Civil marriage is more than a gateway to a vast array of benefits and obligations. As this Court stated in *Windsor*, civil marriage fundamentally alters an individual's relationship to society. 133 S. Ct. at 2692-93. The interests asserted by the states as supporting marriage bans, *i.e.*, in promoting responsible procreation and in democratic decision-making, *DeBoer*, 772 F.3d at 404-08, are insufficient to justify excluding same-sex couples from civil marriage and the societal recognition of their relationship that it brings. This exclusion results in the creation of two classes of citizens: those who can avail themselves of the right to marry and receive its attendant rights and responsibilities, and those who are deemed unfit because of their sexual orientation and therefore are denied the equal protection of the law.

As ABA attorneys have experienced, and as the Court observed in *Windsor*, this unequal treatment of same-sex couples "demeans the couple, [a]nd it humiliates tens of thousands of children now being raised by same-sex couples." 133 S. Ct. 2675, 2694 (2013). *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting separation of students by race "generates a feeling of inferiority as to their status in the community").

Former ABA President and soon-to-be Associate Justice Lewis F. Powell, Jr., stated at his confirmation hearings nearly forty-five years ago that the

Equal Protection Clause is one of the great "freedom clauses" of the Constitution, and this Court, "as the final authority, has the greatest responsibility to uphold the rule of law and to protect and safeguard the liberties guaranteed all of our people by the Bill of Rights and the Fourteenth Amendment." *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 219, 223 (1971) (statement of Lewis F. Powell, Jr.). The cases presented here call upon this Court once again to exercise this important and historic responsibility.

CONCLUSION

Amicus curiae American Bar Association respectfully urges that the judgments of the Sixth Circuit be reversed.

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APPENDIX

Table 1

Select Default Rights Conferred via Marriage and State Law References to Spousal Status

The following table identifies three issues as to which laws in the listed states provide default rights to spouses.[1] The table also provides the statutory reference for each of these rights. The fourth column identifies the number of provisions in the respective state's constitution or statutes that contain any of the following keywords: marriage, married, marry, marrying, marries, husband, wife, spouse, spouses, spousal, widow, widower, widowed.[2]

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[1] With regard to the third column, state statutes pertaining to medical decision-making for incapacitated persons vary. Some provide for a designee or spouse to consent to general medical treatment; others are limited to withdrawing life-sustaining treatment or other specific situations, such as consenting to experimental treatments in life-threatening emergencies. The third column indicates where a state statute gives spouses default medical decision-making power in any of these circumstances.

[2] These numbers were obtained by performing an electronic database (Westlaw) search of the relevant statutes and state constitutions for any of these keywords. Regulations and court rules were excluded. As stated in footnote 6 of the Brief, *supra*, this methodology is necessarily imperfect and may capture provisions that are definitional, that mention the above terms in passing, or that do not actually affect an individual's rights or obligations.

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
AL	Yes[3]	Yes[4]	Yes[5]	701
AK	Yes[6]	Yes[7]	Yes[8]	440
AZ	Yes[9]	Yes[10]	Yes[11]	581
AR	Yes[12]	Yes[13]	Yes[14]	617
FL	Yes[15]	Yes[16]	Yes[17]	648

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[3] Ala. Code § 43-8-41 (2014).

[4] *Id.* § 34-13-11(a)(3).

[5] *Id.* § 22-8A-11(d)(2).

[6] Alaska Stat. § 13.12.102 (2014).

[7] *Id.* § 13.75.020(a)(3).

[8] *Id.* § 13.52.030(c)(1).

[9] Ariz. Rev. Stat. Ann. §§ 14-2102, -2301 (2014).

[10] *Id.* § 36-831(A)(1).

[11] *Id.* § 36-3231(A)(1).

[12] *See* Ark. Code Ann. § 28-9-214(2). (2014) (surviving spouse is entitled to a share by dower and curtesy, but descendants otherwise have priority).

[13] *Id.* § 20-17-102(d)(1)(C).

[14] *Id.* §§ 20-9-602(10), 20-17-214(a)(3).

[15] Fla. Stat. §§ 732.101, .102 (2014).

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
GA	Yes[18]	Yes[19]	Yes[20]	600
ID	Yes[21]	Yes[22]	Yes[23]	492
IN	Yes[24]	Yes[25]	Yes[26]	802
KS	Yes[27]	Yes[28]	Yes[29]	532
KY	Yes[30]	Yes[31]	Yes[32]	508

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[16] *Id.* § 497.005(39)(c).

[17] *Id.* § 765.401(1)(b).

[18] Ga. Code Ann. § 53-2-1(c)(1) (2014).

[19] *Id.* § 31-21-7(b)(3).

[20] *Id.* § 31-9-2(a)(2).

[21] Idaho Code Ann. § 15-2-102 (2014).

[22] *Id.* § 54-1142(1)(d).

[23] *Id.* §§ 39-4504(1)(c), -4514(3).

[24] Ind. Code § 29-1-2-1(b) to (c) (2014).

[25] *Id.* § 29-2-19-17(3).

[26] *Id.* § 16-36-1-5(a)(2).

[27] Kan. Stat. Ann. § 59-504 (2014).

[28] *Id.* § 65-1734(a)(2).

[29] *Id.* § 65-4974(b)(1).

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
LA	Yes[33]	Yes[34]	Yes[35]	1,073
MI	Yes[36]	Yes[37]	Yes[38]	778
MS	Yes[39]	Yes[40]	Yes[41]	479
MO	Yes[42]	Yes[43]	Yes[44]	739

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[30] *See* Ky. Rev. Stat. Ann. §§ 391.010(4), .030 (West 2014) (spouse is entitled to dower share, but other relatives otherwise have priority).

[31] *Id.* § 367.97501(1)(b).

[32] *Id.* § 311.629, .631(1)(c).

[33] La. Civ. Code Ann. arts. 880, 889-90, 894 (2014).

[34] La. Rev. Stat. Ann. § 8:655(A)(1) (2014).

[35] *Id.* §§ 40:1299.53(A)(4), .58.5.

[36] Mich. Comp. Laws §§ 700.2101-.2102 (2014).

[37] *Id.* § 700.3206(2).

[38] *See id.* §§ 333.5653(g), .5655(b)-(d) (identifying "member[s] of the immediate family" as surrogates).

[39] Miss. Code Ann. § 91-1-7 (2014).

[40] *Id.* § 73-11-58(1)(b).

[41] *Id.* § 41-41-211(2)(a).

[42] Mo. Rev. Stat. § 474.010(1) (2014).

[43] *Id.* § 194.119.2(3).

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
MT	Yes[45]	Yes[46]	Yes[47]	547
NE	Yes[48]	Yes[49]	No[50]	586
NC	Yes[51]	Yes[52]	Yes[53]	688
ND	Yes[54]	Yes[55]	Yes[56]	564
OH	Yes[57]	Yes[58]	Yes[59]	933

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[44] *Id.* § 431.064.

[45] Mont. Code Ann. § 72-2-112 (2014).

[46] *Id.* § 37-19-904(2)(c).

[47] *Id.* § 50-9-106(2)(a).

[48] Neb. Rev. Stat. § 30-2302 (2014).

[49] *Id.* § 30-2223(2)(b).

[50] Designated decision-maker required. *See id.* § 30-3401(1) to (2).

[51] N.C. Gen. Stat. § 29-14 (2014).

[52] *Id.* § 130A-420(b)(1).

[53] *Id.* § 90-21.13(c)(4).

[54] N.D. Cent. Code § 30.1-04-02 (2014).

[55] *Id.* § 23-06-03(1) (duty of burial falls to husband or wife).

[56] *Id.* § 23-12-13(1)(c).

[57] Ohio Rev. Code Ann. § 2105.06 (West 2014).

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
OK	Yes[60]	Yes[61]	Yes[62]	610
SC	Yes[63]	Yes[64]	Yes[65]	481
SD	Yes[66]	Yes[67]	Yes[68]	506
TN	Yes[69]	Yes[70]	No[71]	613

[58] *Id.* § 2108.81(B)(1).

[59] *Id.* § 2133.08(B)(2).

[60] Okla. Stat. tit. 84, § 213 (2014).

[61] *Id.* tit. 21, § 1158(3).

[62] *Id.* tit. 63, § 3102A(A)(1).

[63] S.C. Code Ann. § 62-2-102 (2014).

[64] *Id.* § 32-8-320(A)(2).

[65] *Id.* § 44-66-30(A)(4).

[66] S.D. Codified Laws § 29A-2-102 (2014).

[67] *Id.* § 34-26-16(1) (duty of burial falls to husband or wife).

[68] *Id.* § 34-12C-3.

[69] Tenn. Code Ann. § 31-2-104(a) (2014).

[70] *Id.* § 62-5-703(2).

[71] Tennessee does not grant a spouse a default right in this setting. *See id.* § 68-11-1806(c)(3)(A) (physician must identify a surrogate based on enumerated factors, including a general preference for spouses).

State	Spousal right to inherit under intestate succession	Spousal right to dispose of remains	Spousal medical decision-making power	Statutory references to spouse, marriage, related terms
TX	Yes[72]	Yes[73]	Yes[74]	1,236
UT	Yes[75]	Yes[76]	Yes[77]	535
VA	Yes[78]	Yes[79]	Yes[80]	623
WI	Yes[81]	Yes[82]	Yes[83]	724

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[72] Tex. Estates Code §§ 201.002-.003 (2014).

[73] Tex. Health & Safety Code § 711.002(a)(2) (2014).

[74] *Id.* § 166.039(b)(1).

[75] Utah Code Ann. § 75-2-102(1) (West 2014).

[76] *Id.* § 58-9-602(2).

[77] *Id.* §§ 75-2a-108(1)(b)(i), -110(2)(b).

[78] Va. Code Ann. §§ 64.2-200(A)(1), 64.2-201 (2014).

[79] *See id.* § 54.1-2807(B) (authority and directions of next of kin, including spouse, shall govern disposition); *id.* § 54.1-2807.01 (next of kin may petition court in the event of disagreement).

[80] *Id.* § 54.1-2986(A)(2).

[81] Wis. Stat. § 852.01(1)(a) (2014) (including domestic partners).

[82] *Id.* § 154.30(2)(a)(2).

[83] *Id.* § 50.06(3)(a), (5) (including domestic partners).